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TEMKIN WIELGA HARDT & LONGENECKER LLP

1900 Wazee Street, Suite 303
Denver, CO 80202

Elizabeth H. Temkin
Direct: (303)382-2900
temkin@twhlaw.com

Phone: (303)292-4922
Fax: (303)292-4921
www.twhlaw.com

June 14, 2007

VIA EMAIL & FEDERAL EXPRESS

Steve E. Rosenbaum
Senior Engineering Geologist
Land Disposal Program
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670-6114

Dear Mr. Rosenbaum,

07 JUN 15 AM 8:32
SACRAMENTO
CA 95670

This letter is in response to the Draft Cleanup and Abatement Order, Drew Tunnel Nevada County ("Draft Order"), issued by the California Regional Water Quality Control Board, Central Valley Region (the "Board"). Newmont USA Limited ("Newmont") appreciates the Board's two week extension for the receipt of written comments and offers the following general comments, followed by specific comments which correlate with the numbered paragraphs of the Draft Order.

GENERAL COMMENTS

The Board is without jurisdiction to issue a Cleanup and Abatement Order to Newmont. Newmont is neither a present nor past discharger from whom the Board may require cleanup and abatement or demand application for an NPDES permit or waste discharge requirements under federal or state law. The Board's findings are not supported by the weight of the evidence, but rather, reflect that the Board simply adopted the unsubstantiated and inaccurate assertions of the City of Grass Valley ("City") in its lawsuit against Newmont, apparently in response to the City's repeated ex parte requests to the Board to issue a Cleanup and Abatement Order to Newmont, notwithstanding the lawsuit. In addition, Newmont incorporates by reference its April 19, 2007 letter from J. Beckett to P. Creedon, which addresses in detail the facts supporting Newmont's position that it is not a discharger subject to this Board's jurisdiction. A review of the facts, addressed specifically below, reflect that the City is the party responsible for management of the Drew Tunnel discharge.

SPECIFIC COMMENTS

Newmont has the following specific comments related to the draft Order:

1. Though water drains from the Massachusetts Hill Mine workings through the Drew Tunnel, information regarding all of the source or sources of the water is incomplete.
2. Between 1929-57, Empire Star Mines Company ("Empire Star"), a predecessor to Newmont, formerly owned the property where the Massachusetts Hill Mine and Drew Tunnel are located. On May 6, 1957, Empire Star was merged into Newmont Mining Corporation (a predecessor of Newmont USA) and its real property assets were transferred to New Verde Mines Company, a subsidiary of Newmont Mining Corporation. Assuming the Drew Tunnel discharged water between 1929-1957 (no such evidence has been offered), there is no indication that Empire Star, Newmont Mining Corporation, or New Verde Mines Company had knowledge of such discharge, as required under section 13304(a). *See Redevelopment Agency of the City of Stockton v. Burlington Northern*, 2006 WL 931059, *4 (E.D. Cal. 2006).

Further, Newmont does not hold any mineral rights in the Grass Valley area. A subsidiary of Newmont, New Verde Mines LLC (successor to New Verde Mines Company), holds certain mineral rights, below fifty feet, underlying the western portion of the City's wastewater treatment plant ("WWTP") property (the "Site"). The fact New Verde is a subsidiary of Newmont USA is not sufficient grounds for a finding that Newmont holds those mineral rights. In any event, such mineral reservation would not be a sufficient basis to be found to be a "discharger." (See April 19, 2007 letter from J. Beckett to P. Creedon for further detail regarding New Verde's reserved mineral rights.)

Finally, the City routed the Drew Tunnel discharge through its WWTP, where it is discharged under the City's NPDES permit (No. CA0079898) and the accompanying Cease and Desist Order; thus, the discharge does not "cause or permit, or threaten to cause or permit, pollutants to enter waters of the state and create or threaten to create a condition of degradation, pollution, or nuisance."

3. Newmont is not a present owner of the underground mine workings, nor, as detailed in Comment 2, above, does it hold any mineral rights. The City owns the property where any alleged waste is discharged to waters of the state, and has permitted such discharges under its NPDES Permit.

4. See Comment No. 3.

5. No Comment.

6. The WWTP is located on land formerly owned by Empire Star. The City acquired the portion of the Property east of Wolf Creek from Empire Star in 1949. The City acquired the portion of the Property west of Wolf Creek from the Boyce Thompson Institute for Plant

Research in 1972. Boyce Thompson had acquired the property from New Verde Mines Company in 1958.

7. Attachment A does not reflect the topography of the area, as stated by the Board, and does not include a depiction of Allison Ranch Road. The elevations of the Drew Tunnel and the hillside to the west are believed to be approximations, as there are no known surveys of the features.

8. Attachment A does not depict the boundaries of APN 29-290-26, or the WWTP discharge point identified in the City's NPDES permit. Though Attachment B is described as identifying the location of Wolf Creek and other site features, it also includes purported "potential discharge point[s] for mine drainage following tunnel plug installation." This diagram, though it does not so indicate, is the work product of a consultant hired by the City in the course of litigation and its use by the Board, as a presumed neutral and accurate depiction of site features, is inappropriate.

9. In 2000, the City was constructing a secondary clarifier basin, not a pond. The City was aware that the Drew Tunnel discharge was emanating from a mine tunnel as early as 1998. In 1998, the City began the design phase for the WWTP expansion. In July 1998, the City and its consultant "investigated" the Drew Tunnel by poking a pvc pipe in the opening, to determine the size and shape of the "cavern." The City, in 1998, referred to the Drew Tunnel as a "mine vent shaft" and an "existing mine drainage." The City's design engineer recommended the City do further investigations to determine its origin and characteristics before going forward with construction plans, but the City refused. The City also did not report the drainage to the Board at this time or try to work with the Board pre-construction on the regulatory considerations and options. This would have allowed the City to consider other design options and alternatives to its construction plans, such that the ensuing events and regulatory triggers could have been avoided.

10. In the Sportfisher litigation, the City identified the diversion to the WWTP plant as a "permanent diversion" not an "interim" measure.

11. The Drew Tunnel originates at the Massachusetts Hill Shaft, not at the Watt Incline.

12. No Comment.

13. The statement that Empire Star Mines Company Limited is a "Newmont company" is ambiguous and misleading, and simply reflects, verbatim, the City's litigation position. The Board's reliance on such statements as "findings" is inappropriate and without support. Empire Star was incorporated in 1929. During the time the company operated, a Newmont subsidiary, Newmont Empire Mine Company, owned anywhere from 30% to 51% of the stock. For further description of Empire Star, see Comment 2, above, and the April 19, 2007 letter from J. Beckett to P. Creedon.

The statement that "the Massachusetts Hill Mine was consolidated with other mines and is subsequently referred to as the North Star Mine" again mimics the City's litigation posture and is similarly ambiguous and misleading. In 1929, long after mining had ceased, ownership of the Massachusetts Hill Mine was conveyed, along with numerous other mines, from North Star Mines Company to Empire Star. The Massachusetts Hill Mine was never "consolidated" with any other mine and was never mined after 1901. Further, available maps show no physical connection between the Massachusetts Hill Mine and the North Star Mine.

14. The deed from Empire Star Mines Company Limited to Newmont Mining Corporation conveyed the real property of Empire Star to Newmont Mining. Among others, that conveyance included the property known as the North Star Mine. On January 3, 1958, New Verde Mines Company conveyed the Site to Boyce Thompson Institute for Plant Research, Inc. In October 1962, Boyce Thompson conveyed the Site to the City of Grass Valley. On December 12, 1966, New Verde Mines Company conveyed to Newmont Exploration Limited certain real property described in an Indenture, recorded December 16, 1966. New Verde Mines Company was not dissolved until January 9, 1967. In 1998, Newmont Exploration Limited conveyed certain property interests in the Grass Valley area to Newmont North America LLC. By a certificate dated October 16, 1998, Newmont North America LLC changed its name to New Verde Mines LLC.

15. The phrase "Newmont's land holdings" is inaccurate, as Newmont has no "land holdings" in Grass Valley (see Comment No. 2).

16. The sulfate concentration and pH are not necessarily reflective of the presence of acid mine drainage, as the sulfate concentrations are extremely low and the pH much higher than typical acid mine drainage conditions. The sulfate and pH values may be more reflective of the natural variability of groundwater conditions, including shallow groundwater along a bedrock redox zone. Presently, the Drew Tunnel discharge is routed through the WWTP and thus no discoloration occurs in Wolf Creek during high stormwater events.

17. The statements of paragraph 17 are inconsistent, as they state both that the sampling "suggested no problems," yet "laboratory detection levels were high compared to water quality criteria." Results from the February 2000 sampling event did not exceed water quality criteria at that time.

18. No comment.

19. The conditions under which the samples were collected is unknown, including whether increased turbidity was related to high flow conditions.

20. The Joint Investigation Agreement between Newmont and the City was negotiated in the context of confidential Rule 408 settlement communications. Newmont did not concede any liability and maintains it is not liable for management of the Drew Tunnel discharge.

21. The last sentence of paragraph 21 misstates the facts. In October 2002, MWH provided a scope of work for further evaluation of the feasibility of an adit plug. MWH did not recommend "additional steps," but rather, was requested to present a proposal for additional investigation. Further, the scope of work was for additional investigation into the feasibility of a mine plug; not for "additional steps to be taken to plug the tunnel."

22. No Comment.

23. No Comment.

24. This paragraph is irrelevant, unnecessary, and simply states the City's litigation position. No "alternatives" have been identified in the lawsuit.

25. The document titled *TAS Draft Sample Plan for the City of Grass Valley Wastewater Treatment Works* presented a plan for monitoring to characterize the Drew Tunnel flows, not groundwater monitoring or characterization.

26. No Comment.

27. The Design Investigation Work Plan proposed certain investigations and a conceptual design of a plug with a maximum hydraulic head of fifteen feet and a "flow through" release once the maximum head was reached.

28. No Comment.

29. No Comment.

30. No Comment.

31. No Comment.

32. The Regional Board has indicated that a plug is not a viable alternative unless it can be assured the water will not discharge elsewhere. (See, e.g., Nov. 22, 2004 letter from RWQCB to R. Golnik.) The "plugging" alternative identified in the City's November 2004 work plan titled *Design Investigation Work Plan, Drew Tunnel Plug* proposed installation of a plug, designed to control water flow, but still requiring treatment or management of water that exceeded the conceptual design head of fifteen feet.

33. A review of the City's Discharge Monitoring Reports reflects that manganese is the only constituent for which the City has not been able to consistently meet effluent limits. In fact, the City has demonstrated continuous compliance with the effluent limits for aluminum and iron since August 2003 (June 1, 2006 City of Grass Valley Status and Progress Report to Board).

34. The information in paragraph 34, dating from September 2003, reflects a limited number of sampling events. Significantly more data is now available and the sampling results should be updated to reflect all of the data that has been collected. The NPDES permit average monthly concentration and load limits shown in the table are from the draft NPDES permit and do not reflect the current effluent limitations in the City's NPDES permit.

35. The draft CAO does not have a numbered paragraph 35.

36. The table relating to paragraph 36 should be updated to reflect recent data; Newmont will provide additional available data under separate cover. Newmont does not have information regarding the basis for the Board's hardness determination of 13 mg/l to consider whether the effluent limits of copper, lead and zinc are appropriate.

37. A comparison of the relative copper and aluminum loading to the WWTP from the Drew Tunnel and the treatment headworks influent stream reflects the Drew Tunnel contributes only 2% of the copper and 2% of the aluminum to the WWTP. Therefore, removal of the copper and aluminum loading from the Drew Tunnel would not substantially aid the City in meeting its WWTP effluent limitations for these constituents.

38. The availability of groundwater information is unknown. Determining background concentrations, and sources of any groundwater impacts, in a mineralized zone is particularly problematic.

39. – 46. No Comment.

47. Newmont is not responsible for the Drew Tunnel discharge. As described in the comments above and the April 19, 2007 letter from J. Beckett to P. Creedon, Newmont is not a present or past discharger at the Drew Tunnel.

48. No Comment.

49. Newmont does not have a duty to apply for an NPDES permit, as alleged, because Newmont does not "discharge or propose to discharge pollutants," as required by 40 CFR 122.21. Further, the Drew Tunnel discharge is permitted by the City under its NPDES Permit. Similarly, as noted in Comments 2 and 3, above, Newmont does not discharge wastes that affect waters of the State.

50. No Comment.

51. No Comment.

Steve E. Rosenbaum

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REQUIRED ACTIONS

Newmont agrees that further investigation of the sources of loading to the Drew Tunnel discharge is advisable. That said, Newmont is not a past or present discharger, does not own the water, the property or hold any property rights proximate to the discharge, and is not responsible for the management of the Drew Tunnel discharge.

Sincerely yours,



Elizabeth H. Temkin

EHT/csi

cc: Frances McChesney (via email)
Jacqui Beckett (via email)

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CYRVOCB